IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

NO. 80-5266

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DONALD WAYNE THOMAS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Was the trial court constitutionally required to provide the Petitioner with an evidentiary hearing on the issue of competency to stand trial under the circumstances of the instant case?

2.

Does the Petitioner's death sentence violate the constitutional principles set forth in the case of Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759 (1980)?

3.

Was the jury properly selected under the principles contained in the case of Witherspoon v. Illinois, 391 U.S. 511 (1968)?

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The State of Georgia, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the Petition for Writ of Certiorari, which seeks review of the decision of the Supreme Court of Georgia in this case. That decision is recorded as Thomas v. State, __ Ga. __,(1980), No. 36046, decided April 23, 1980, and has been attached as an appendix to the petition.

II.

STATEMENT OF THE CASE

Donald Wayne Thomas, Petitioner, was indicted in Fulton County in May, 1979, for the murder of Dewey Baugus. (R. 1-2). Following the first psychiatric examination, Petitioner was found on June 1, 1979 not competent to stand trial. (R. 8-11). However, after a later examination, Dr. Jose M. Delatorre of Central State Hospital infomed the Court on September 24, 1979, that Petitioner was able to distinguish right from wrong, and had not been acting under the influence of a compulsive delusion and was competent to stand trial. (R. 16-17). Following a jury trial, Petitioner was found guilty and was sentenced to the death penalty. (R. 119-120).

On April 19, 1979, the partially decomposed body of nine-year-old Dewey Baugus was found in the bushes near some railroad tracks in Atlanta. (T. 345-346, 411-417). Young Baugus had last been seen alive several days earlier by a playmate when they went to a ball field together. (T. 460-461).

An autopsy performed by Dr. Saleh Zaki showed that the victim had sustained abrasions and bruises on the neck extending to the larynx and upper chest, and a hemorrhage in the left eye. (T. 433-434). Bruises were also discovered on the head and there were fine hemorrhages in the coverings of the lung and heart. (T. 434-435). Due to the body's advanced stage of decomposition, Dr. Zaki could not determine the time of death, but did state the victim had been dead at least three days. (T. 443). The cause of death was asphyxiation due to neck trauma, probably strangulation, according to Dr. Zaki. (T. 435).

The State's main witness and Petitioner's girlfriend, Linda Cook, testified that she had known both Petitioner and

the victim. (T. 349-350). Ms. Cook stated that on April 13, 1979, Petitioner led her to the railroad tracks where she saw the body of Dewey Baugus lying on his stomach. (T. 351-352). Ms. Cook noticed that Petitioner had blood on his pants. (T. 350). Petitioner told her that he had killed Baugus. (T. 352). Petitioner then turned the boy's body over and proceeded to jump on the victim's neck. (T. 352). He told Ms. Cook that he had to make sure that Baugus was dead. (T. 352). He then threw the body into some bushes. (T. 352). Ms. Cook further testfied that Petitioner said he had choked and beaten the victim with a stick. (T. 380).

Petitioner's stepfather, Enzor Lowe, testified that both Ms. Cook and Petitioner told him that Petitioner had killed a boy. (T. 387, 390). Lowe further stated that Petitioner had been grinning when he admitted the killing and that he (Lowe) did not believe Petitioner. (T. 390).

Glenda Wilborn, the victim's mother, stated that she had last seen her son the evening of April 11th when he left home with a playmate. (T. 469). On April 12th, Linda Cook came to stay with Ms. Wilborn, but the Petitioner came by later that day to get Ms. Cook. (T. 471-472).

After police were informed by Ms. Cook that Petitioner had thrown his bloodied pants behind his Primrose Circle apartment, Detective Guy Lloyd found a pair of stained pants in the area described by Ms. Cook. (T. 355, 401-402, 403).

An examination of the pants by a forensic serologist revealed that the stain was blood of human origin. (T. 464-465).

Following the State's evidence, the defense rested its case without presenting any witnesses or evidence. (T. 496).

In the sentencing phase, the State introduced copies of an indictment plea and sentence of the Petitioner to child molestation (R. 557, 588, 589, 590) and introduced copies of an accusation plea and sentence of the Petitioner to the charge of aggravated assault with intent to rape. (T. 558, 591, 592, 593, 594).

The Supreme Court of Georgia affirmed the Petitioner's conviction and sentence on April 23, 1980. Thereafter, the Petitioner filed this Application for Writ of Certiorari.

REASONS FOR NOT GRANTING THE WRIT

I.

THE TRIAL COURT WAS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE THE PETITIONER WITH AN EVIDENTIARY HEARING ON THE ISSUE OF COMPETENCY TO STAND TRIAL UNDER THE CIRCUMSTANCES OF THE INSTANT CASE.

In the instant case, three psychiatric evaluations of the Petitioner were performed by Order of the trial court. The first evaluation was reported to the trial court in the letter of Lloyd T. Baccus, M.D., dated June 4, 1979, which in substance indicated that the Petitioner was at that time, incompetent to stand trial. (See Appendix to Petition, pp. 9a, 10a). The second evaluation was done by Sheldon B. Cohen, M.D., and was reported to the trial court by letter on August 8, 1979. (See Appendix to Petition, pp. 11a,12a). The report, in substance, could not reach a definitive diagnosis as to the Petitioner's competence to stand trial. Dr. Cohen's report noted that there was a conflict between the information gathered in his observation of the Petitioner and the prior evaluation and speculated that this may have been caused by the effect of a prescribed tranquilizer, or ". . . that he may have simulated more in the previous interview than he did today." Dr. Cohen then recommended extended observation at Central State Hospital to clarify these factors.

The Petitioner had filed on June 25, 1980, a Special Plea of Incompetency to Stand Trial and a Motion for Transfer of Defendant to The Department of Human Resources. (See Appendix to Petition, pp. 13a, 14a). On August 10, 1979

the trial court issued an Order transferring the Petitioner to the Department of Human Resources. (See Appendix of Petition, p. 15a).

On September 2,4 1979, Jose M. Delatorre, M.D., reported to the trial court by letter in substance that based on the examination and evaluation conducted at Central State Hospital, that the Petitioner was competent to stand trial.

The Petitioner then went to trial on a general plea of not guilty on October 22, 1979. (T. 17).

It is apparent from the evidence before the trial court both prior and during the trial in the instant case that the quantum of evidence necessary to trigger a competency proceedings requiring an evidentiary hearing was not reached.

The general considerations in measuring this quantum of evidence necessary to trigger a competency procedure requiring an evidentiary hearing are (1) A history of irrational behavior; (2) the Defendant's demeanor at trial, (3) along with prior medical opinion. Chenault v. Stynchombe, 546 F.2d 1191 (5th Cir. 1977), cert. denied 434 U.S. 878.

The resolution of this issue by necessity requires an individualized analysis. Jackson v. Caldwell, 461 F.2d 682 (5th Cir. 1972), cert. denied 409 U.S. 991 (1973). The Fifth Circuit Court of Appeals has noted in the case of Grissom v. Wainwright, 494 F.2d 30 (5th Cir. 1974) that extensive hearings and thorough psychiatric examinations are not vital prerequisites to the prosecution of every criminal case. Indeed, low intelligence or weird behavior cannot be equated with mental incompetency to stand trial. McCune v. Estelle, 434 F.2d 611 (5th Cir. 1976).

Comparing the instant case with analgous proceedings under 18 U.S.C.A. 4244, it is clear that where a trial court had ordered a psychiatric evaluation and report, and that report indicated that the defendant was competent to stand trial, that no evidentiary hearing would be required. United States v. Greier, 521 F.2d 597 (5th Cir. 1975). As such, the trial court in the instant case took appropriate affirmative steps to examine the competency of the Petitioner within the constitutional parameters as set out in Pate v. Robinson, 383 U.S. 375 (1966) and Drope v. Missouri, 420 U.S. 162 (1975). It can be seen from the report dated September 24, 1979 from Dr. Delatorre of Central State Hospital that there was insufficient evidence before the trial court to raise a bona fide and reasonable doubt as to the defendant's competency to be tried at the given point in time.

Therefore, the trial court was not required to hold an evidentiary hearing on the issue of the competency of the Petitioner to stand trial and as such, none of the Petitioner's constitutional rights have been violated in this regard.

II.

THE PETITIONER'S DEATH SENTENCE DOES NOT VIOLATE THE CONSTITUTIONAL PRINCIPLES SET FORTH IN GODFREY V. GEORGIA.

In the instant case the Petitioner was sentenced under the jury's finding of the aggravating circumstance given in Ga. Code Ann. § 27-2534.1(b)(7). This Court in Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759 (1980) found that § (b)(7) was unconstitutionally applied in that case. A review of some of the facts of the instant case shows that it is at the core rather than the periphery of the universe of murder cases and as such is distinquishable from Godfrey.

The victim in the instant case was a nine year old boy whose body weighed only fifty-seven pounds and was only fifty-one inches tall. (T. 432). The kind of force applied to strangle this boy, as seen from Dr. Zaki's testimony, is strong evidence of torture when it is applied to such a small frame. (T. 441). While this amount of force might not constitute torture to a full grown man, it is certainly strong evidence of such when it is applied to a little boy. Added to this is the disarray of the victim's clothes, including the victim's blue jean pants which had been lowered to mid-thigh which were evidence of a sexual assault. (T. 432, 347).

Further, in the instant case there is the testimony that the Petitioner took a witness, Linda Cook, out to the scene of the crime and proceeded to jump on the neck of the body. (T. 349 - 352). This is strong evidence of the inhuman way in which this killing was done and of the depravity of mind of the Petitioner at the time of the killing.

Therefore, under the facts of this case it is clear that this murder is a type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of

mind of the Defendant and torture to the victim. See Hance v. State, ___ Ga. ___, Case. No. 36012 (decided June, 1980).

III.

THE JURY WAS PROPERLY SELECTED UNDER THE PRINCIPLES OF WITHERSPOON V. ILLINOIS.

This Court has made it clear that a state may constitutionally exclude veniremen from a jury who make it unmistakably clear, (1) That they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) That their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt. Witherspoon v. Illinois, 391 U.S. 511, 522-523, n. 21.

The Petitioner complains of alleged Witherspoon violations concerning the prospective jurors, Frances Ogletree, Joyce Beachum, Eddie Watkins, Christine Reese and Evelyn Thompson, (See Appendix to Petition, pp. 54(a) - 74(a)). A review of the testimony of these prospective jurors shows that each was properly excused under the Witherspoon rule.

Further, assuming arguendo that one juror was improperly exluded, this would have been under the facts of the instant case, harmless error. In a capital case in Georgia, the defense has twenty peremptory challenges and the State has ten. Ga. Code Ann. § 59-805. In the Petitioner's case, when the twelfth juror was selected (T. 323), the State had only exercised nine peremptory strikes. (T. 315, 318, 319, 320, 322, 323).

This Court has denied Application for Certiorari in the case of Alderman v. State, 241 Ga. 496, cert. denied, ___ U.S. ___, 99 S.Ct. 593 (1979) where the Georgia Supreme Court has ruled that the possession of remaining peremptory strikes by the State renders an equal number of jurors stricken for cause in violation of the Witherspoon rule harmless.

The Fifth Circuit Court of Appeals has ruled that this Court's decisions, especially Davis v. Georgia, 429 U.S. 122 (1976), rev'g. 236 Ga. 804 (1976) require that a Witherspoon violation cannot be found to be harmless error. Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979); Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979).

The Respondent submits that the interpretation by the Fifth Circuit Court of Appeals would have the decisions of this Court place an undue restriction on the application of a harmless error principle. The Fifth Circuit has construed Davis v. Georgia, supra to hold that the exclusion of one venireman on grounds at variance with the Witherspoon standard was fatal, and this although the State may have gone to trial with one peremptory challenge unexercised, Burns v. Estelle, supra at 1299. This Court in Davis v. Georgia, did not discuss the possibility of peremptory challenges. The dissent in Davis merely noted that there may have been peremptory challenges unexercised. The issue of peremptory challenges was not involved in the decision of Davis and the Respondent submits that the Fifth Circuit Court of Appeals' reliance on Davis for this point is unwarranted.

Therefore, the Petitioner's constitutional rights with regard to the selection of the jury have not been violated.

CONCLUSION

For all the foregoing reasons, this Court should decline to grant the Petition for Writ of Certiorari filed by Donald Wayne Thomas.

Respectfully submitted,

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